SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1967

No. 844

VINCENT R. MANCUSI, Warden of Attica State Prison, Attica, New York,

Petitioner,

against

FRANK DEFORTE,

Respondent.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

Preliminary Statement

Respondent adopts the material in Petitioner's brief under the headings "Opinions Below", "Jurisdiction", and "Constitutional Provisions"

Question Presented

Whether respondent, a Vice President of Local 266 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, had "standing" to object to the use of various union books and records

against him in a criminal prosecution, which were admittedly illegally seized from the union's office by State officials over respondent's protest?

Statement of the Case

Respondent was Vice President of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America[1] in Nassau County, New York. Along with two other officers[2] of Local 266, respondent was indicted by the Nassau County Grand Jury for Conspiracy (N. Y. Penal Law § 580), Coercion (N. Y. Penal Law § 530) and Extortion (N. Y. Penal Law § 850 and 851)[3].

On March 13, 1959 and prior to indictment, a subpoena *duces tecum* (A. 22) was issued to Local 266 by the Nassau County District Attorney's Office, commanding the production of certain union books and records before the District Attorney, Nassau County, Mineola, New York. Respondent refused to comply with the subpoena when it was served upon him at the office of Local 266.

Upon refusal of respondent to comply with the subpoena, and dispite the absence of a search warrant, the State authorities then searched the premises and seized the union books and records over the protest of respondent. The State, without any reservation whatsoever, has admitted the illegality of the search and seizure[4] (A. 24 and 31).

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[1] Hereinafter called Local 266.

[2] Twelve other defendants were also indicted.

[3] It was alleged there was a criminal conspiracy to eliminate and restrict competition amongst the various owners of juke boxes in the New York area, by exacting illegal fees in the form of dues and assessments.

[4] The only issue is the standing of respondent to object to the illegal search and seizure.

Respondent made a substantial portion of the entries in the books and records, as well as having participated in the preparation of the records (A. 51). Most of these same books and records of Local 266 which were illegally seized were introduced into evidence at trial over objection[5] (A. 52).

Trial in Nassau County resulted in a conviction of respondent[6] before a jury, and he was sentenced for a term of three (3) to five (5) years in State Prison on June 21, 1960.[7]

The illegal search and seizure question was unsuccessfully raised by respondent through State Court appeals[8]. Pursuant to the requirements of 28 U. S. C. 2254, all available State remedies have been exhausted.

While serving his prison sentence in Attica State Prison, Attica, New York, respondent filed a prison made petition for Writ of *Habeas Corpus* in the United States District Court for the Western District of New York.[9] This application was denied upon the grounds that the standards of *Jones v. United States,* 362 U. S. 257, did not apply to non-possessory crimes and the personal nature of the Fourth Amendment was being ignored.

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[5] Brief for Petitioner, p. 4.

[6] As well as the other two officers.

[7] Respondent began to serve his sentence when State appeal procedures were exhausted.

[8] *People v. DeGrandis, et al.,* 16 A. D. 2d 834, 228 N. Y. S. 2d 875 (2d Dept. 1962); affirmed without opinion, 12 N. Y. 2d 812, 187 N. E. 2d 130 (1962); amended remittitur, 12 N. Y. 2d 946, 188 N. E. 2d 794 (1963), cert. denied 375 U. S. 868. In essence, the State Courts held *Mapp v. Ohio,* 367 U. S. 643, inapplicable because no individual right of respondent was violated.

[9] Respondent previously had been denied Federal *Habeas Corpus* relief on the allegation that the jury had been coerced. 335 F. 2d 173 (2nd Cir. 1964).

On appeal, the United States Court of Appeals for the Second Circuit reversed and ordered the issuance of the Writ of *Habeas Corpus*. The Court concluded that *Jones v. United States, supra,* did apply; that accordingly, respondent was the victim of the illegal search and seizure; and his privacy had been invaded (A. 33-44).

Motions for rehearing (A. 46) and rehearing in banc (A. 47) were denied, and respondent was unconditionally released pending further hearing to this Court (A. 48-49).

Summary of Argument

I. A. The Fourth Amendment prohibits unlawful searches and seizures by state officials. *Mapp v. Ohio,* 367 U. S. 643. *Linkletter v. Walker,* 381 U. S. 618, 622 affirmed *Mapp,* limiting the exclusionary rule to State Court convictions which had not become "final" before the rendition of *Mapp.* Respondent's judgment of conviction was not finally affirmed until after *Mapp* had been decided and therefore, he was entitled to the exclusionary rule if standing existed. *Jones v. United States,* 362 U. S. 257 established guidelines as to who can raise the Fourth Amendment to exclude illegally seized evidence. According to *Jones,* one need not own the searched premises or seized evidence in order to gain standing. Rather, the person seeking suppression must be the (1) "victim, *i.e.,* against whom the search is directed and (2) "anyone legitimately on the premises where a search occurs may challenge its legality." 362 U. S. at 261-67.

B. *Jones* applies to respondent for the following reasons:

1. Respondent was the "victim" of the unlawful search and seizure. There can be little doubt that the search was

directed at respondent. As an officer of Local 266, the authorities had to prosecute respondent in order to extinguish the alleged illegal activities of Local 266. "Monitors" had been placed on the phones of Local 266 to gain information about respondent. The local was never indicted or fined and in fact, never commenced operation again after the conviction of respondent and his fellow officers. Thus, respondent, and not Local 266, was the victim of the search and seizure.

2. According to *Jones*, "even were this not a prosecution turning on illicit possession (which by itself convicts) the legally requisite interest in the premises was here satisfied * * *(A)nyone legitimately on the premises where a search occurs may challenge its legality." 362 U. S. at 263-67. By implication, *Jones* also rejected the former strict tests of standing in the property seized. *United States v. Birrell*, 242 F. Supp. 191 (S. D. N. Y. 1965).

As an officer of Local 266, respondent was legitimately on the premises and objected to the illegal search and seizure. He also contributed substantially to the actual preparation of the books and records and spent a great deal of each working day in the office.

While respondent did not own the premises, his place of business was in the office of Local 266 and as such, he is entitled to protection from an illegal search and seizure. *Berger v. State of New York*, 388 U. S. 41. Because respondent was the victim and he was legitimately on the premises, his privacy was invaded. *Jones v. United States, supra; Warden v. Hayden*, 387 U. S. 294. As a result of the State's arbitrary action, respondent has standing to suppress the illegal seizure of union books and

records even though he did not own the premises or the books and records.

II. The issue in this case does not relate to the Fifth Amendment, but rather to the Fourth Amendment. Petitioner's relies on *United States v. White,* 322 U. S. 694, and *Wilson v. United States,* 221 U. S. 261, to support the conclusion that respondent has no "personal privilege" under the Fourth or Fifth Amendments with respect to union books and records. These cases deal only with the right of an officer to refuse production of corporate or union records in response to a lawfully issued subpoena. In the instant case, an unlawful search and seizure occurred and as such, respondent's Fourth Amendment rights were violated. Since respondent qualifies under *Jones,* he can assert the Fourth Amendment.

III. Respondent, as discussed, has not relied on the protection of the Fifth Amendment. Rather, respondent seeks suppression because the Fourth Amendment prohibits illegal actions conducted by the State authorities. While there may be "an intimate relationship" between the Fourth and Fifth Amendments, *Boyd v. United States,* 116 U. S. 616, 633, "the philosophy of each Amendment is complementary, although not dependent upon that of each other." *Mapp v. Ohio,* 367 U. S. 643, 651. Therefore, even though there may have been no Fifth Amendment right to seek suppression, the Fourth Amendment standing alone protects respondent. *Schmerber v. California,* 384 U. S. 757.

IV. Notwithstanding, the development of the Fourth Amendment, as early as 1920, it was recognized that an illegal seizure of corporate paper precluded usage against the officers of the corporation. *Silverthorne Lumber Co.*

v. United States, 251 U. S. 385. Even though the same books and records could have been lawfully subpoenaed, the illegal action of the Government prevented such usage as evidence. *Mapp* brings the force of *Silverthorne, supra,* to bear upon the States and therefore, *Silverthorne* is additional authority to support decision of the Court of Appeals.

POINT I

Under *Jones v. United States,* Respondent has standing to challenge the illegal search and seizure of Union Books and Records.

A.

***Jones v. United States,* and the standing requirement.**

While the Fourth Amendement[10] excludes illegally seized evidence, the standing requirement, that is the right or privilege to assert the Fourth Amendment, has not permitted the exclusionary rule to be applied to everyone.[11]

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[10] *Mapp v. Ohio,* 367 U. S. 643, applied the Fourth Amendment to the States; *Linkletter v. Walker,* 381 U. S. 618, reaffirmed *Mapp,* limiting the exclusionary rule to State Court convictions which had not become "final" before the rendition of *Mapp.* "By final, we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in *Mapp v. Ohio.*" 381 U. S. at 622, Footnote 5. Respondent's original appeal through petition for certiorari was not denied until October, 1963, considerably after *Mapp* had been decided. Thus, if standing existed, respondent is entitled to the exclusionary rule. As will be seen throughout this brief, new rules of standing have not been created and therefore, *habeas corpus* relief is entirely proper.

[11] See Comment, *Standing to Object to an Unreasonable Search and Seizure,* Volume 34 University of Chicago Law Review 342, 343 Footnote 8 (1967), for reference to various commentaries on the standing requirement; See Comment, *Standing to Object to an Unlawful Search and Seizure,* 1965, Wash. U. L. Q. 488, 489, Footnote 5 citing cases prior to *Jones v. United States.*

Jones v. United States, 362 U. S. 257, re-examined the standing requirement and set forth criteria for determining who could raise the Fourth Amendment to exclude illegally seized evidence.

The defendant in *Jones* was charged with the unlawful possession of narcotics, the possession of which was sufficient to convict. Federal agents had found narcotics hidden in an apartment, where defendant was a guest. Jones sought suppression of the seized narcotics under Rule 41(e)[12] of the Federal Rules of Criminal Procedure. The Government argued that defendant did not allege ownership of the seized articles or an interest greater than that of an invitee or guest in the searched apartment. Reversing the conviction, the Court held:

> (1) Where possession both convicts and confers standing, defendant need not make a preliminary showing of an interest in the premises searched or property seized.
>
> (2) Defendant's presence in the apartment made out a sufficient interest in the premises to constitute him a "person aggrieved" by the search.

Speaking for a unanimous Court, Mr. Justice Frankfurter stated:

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[12] Rule 41(e) provides in part: "A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. * * *"

> "In order to qualify as a 'person aggrieved[13] by an unlawful search and seizure' one must have been the victim of a search and seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else." 362 U. S. at 261.

After discussing the "dilemma"[14] of a defendant charged with possession of narcotics and at the same time being required to claim an interest in the premises or evidence, the Court declined to limit its holding to this situation and specifically stated:

> "(E)ven were this not a prosecution turning on illicit possession, the legally requisite interest in the premises[15] was here satisfied, for it need not be as extensive a property interest as was required by the courts below." 362 U. S. at 263.

The Court emphasized that technical property concepts "ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards."[16] Thus, "anyone legitimately on the premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him."[17]

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[13] The constitutionality of a search and seizure is governed by Federal standards. *Jones* presumably governs standing to suppress evidence in a State Court prosecution because basic constitutional principles are involved. *Coffey v. Fay,* 344 F. 2d 625, 628 (2nd Cir. 1965). See also *Ker v. California,* 374 U. S. at 36; see dissent of Mr. Justice Harlan in *Berger v. State of New York,* 388 U. S. at 102.

[14] It was concluded that when possession convicts, no preliminary showing of standing need be asserted. 362 U. S. at 262-264.

[15] See *United States v. Birrell,* 242 F. Supp. 191, 198 (S. D. N. Y. 1965) "*Jones* rejected the former strict tests (of standing) as to the property interest in the premises searched and, at least by implication, in the *property seized*" (emphasis added).

[16] 362 U. S. at 266.

[17] 362 U. S. at 267.

The *Jones* ruling liberalized the standing requirement liberated it from property law concepts. *Wong Sun v. United States*, 371 U. S. 471, subsequently approved *Jones* but without lengthy discussion. There is no doubt that subsequent to *Jones* a defendant need not own the seized evidence or searched premises. *Jones* abandoned fiction to reflect the intention and spirit of the Fourth Amendment.

B.

***Jones v. United States*, applies to respondent.**

The guidelines[18] of *Jones* have never been fully explored by this Court since the case was decided. The two tests set forth in *Jones* require that the party seeking suppression must be the (1) "victim" and (2) anyone legitimately on the premises may object to the search and seizure.

1. Respondent was the "victim" of the illegal search and seizure.

According to *Jones*:

> "The restrictions upon searches and seizures were obviously designed for the protection against official invasion of privacy and security of property. They are not exclusionary provisions against the admissions of kinds of evidence deemed inherently unreliable or prejudicial. The exclusion in federal trials of evidence otherwise competent but gathered by federal officers in violation of the Fourth Amendment is a means for making effective the protection of privacy.

[18] In the instant case, Judge Kaufman noted that while *Jones* informs what is not required to confer standing, the Supreme Court has avoided formulating any specific rules for determining what is required. 379 F. 2d at 902; see also *Henzel v. United States*, 296 F. 2d 650, 652 (5th Cir. 1961).

> Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim[19] of an invasion of privacy." 362 U. S. at 261.

Unquestionably, respondent was the "victim" of the illegal search and seizure, that is, against whom the search was directed. Complaints had been made by disgruntled persons concerning the alleged improper activities of respondent. "Monitors" had been placed on the phones of Local 266 to gather information and a general investigation was conducted regarding the activities of respondent and his fellow union officers. Moreover, the District Attorney was required to prosecute respondent to effectively curtail the activities allegedly perpetrated under the guise of Local 266, an unincorporated association. Local 266 was never indicted, prosecuted or even fined. If the officers were imprisoned, as they were, Local 266 would wither and die unless succeeding parties attempted to carry on the alleged illegal activities. This never happened. By imprisoning the officers, including respondent, the State extinguished the Union's activities, and thereby accomplished its ultimate purpose.

In reality, respondent, not Local 266,[20] was the "victim" of the search and seizure. In treating the victim ration-

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[19] By "victim" is meant one against whom the search was directed as distinguished from one who is prejudiced. 362 U. S. at 261.

[20] The State argued before the District Court and Court of Appeals that Local 266 was the "victim" rather than respondent because the State's investigation was directed at the Union. The Court of Appeals strongly felt otherwise. "While the State insists that the search and seizure were conducted against Local 266, we would be blind to reality if we did not recognize that the action by the State officials was actually 'directed' at DeForte." 379 F. 2d at 902 (A. 39).

ale, Justice Frankfurter was plainly cognizant of a violation of privacy.[21] Thus, the first requirement of *Jones* is convincingly "established"[22] by respondent.

2. Respondent was legitimately on the premises when the illegal search and seizure occurred.

In further discussing the standing requirement of *Jones*, Mr. Justice Frankfurter specifically stated:

> "Even were this not a prosecution turning on illicit possession, the legally requisite interest in the premises was here satisfied, for it need not be as extensive a property interest as was required by the courts below." 362 U. S. at 263.

In reference thereto, the Court then noted:

> "As a second[23] ground sustaining 'standing' here we hold that petitioner's testimony on the motion to suppress made out sufficient interest in the premises to establish him as a person aggrieved by the search." 362 U. S. at 265.

The Court refuted technical distinctions previously developed in lower courts[24] and concluded:

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[21] 362 U. S. at 261.

[22] 362 U. S. at 261.

[23] The first ground was that where possession convicts and confers standing, there need be no showing of an interest in the premises searched or property seized. 362 U. S. at 263.

[24] "While this Court has never passed upon the interest in the searched premises necessary to maintain a motion to suppress, the Government's argument closely follows the prevailing view in the lower courts. They have denied standing to 'guests' and 'invitees' [citing cases] and employees, who though in 'control' or 'occupancy' lacked 'possession [citing cases]. The necessary quantum of interest has been distinguished as being, variously, ownership in or right to possession of the premises' [citing cases], the interest of a 'lessee

(Footnote continued on following page)

> "No just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on premises[25] where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him. This would of course not avail those who, by virtue of their unlawful presence, cannot invoke the privacy of the premises searched."[26]

Not only was respondent the "victim" of the search and seizure, he furthermore had a "sufficient interest" in the premises searched and the property seized to establish him as a "person aggrieved" by the search and seizure. Respondent prepared much of the material contained in the books and records of Local 266, which were seized in

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or licensee' [citing cases], or of one with 'dominion' [citing cases]. We do not lightly depart from this course of decisions by the lower courts. We are persuaded, however, that it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. Even in the area from which they derive, due consideration has led to the discarding of these distinctions in the homeland of the common law. See Occupiers' Liability Act. 1957, 5 and 6 Eliz. 2, c. 31 carrying out Law Reform Committee, Third Report, Cmd. 9305. Distinctions such as those between 'lessee,' 'licensee,' 'invitee' and 'guest' often only of gossamer strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards." 362 U. S. at 265-66.

[25] Counsel for the respondent suggests that because the Fourth Amendment is based on deterrence rather than self incrimination, a complete examination of the "on the premises" test and the *standing* requirement may be in order. This was suggested in oral argument before the Court of Appeals. See Comment, *Standing to Object to an Unreasonable Search and Seizure,* 34 University of Chicago Law Review 342, 1967.

[26] Because Jones was in the apartment with the consent of the lawful occuppier, he was entitled to suppression even though he did not own the premises. 362 U. S. at 267.

the union office. He co-signed all checks. Respondent spent a considerable amount of each working day in the union office. As an officer of Local 266, he was legitimately on the premises and objected to the search and seizure.

Admittedly, the search and seizure occurred on the premises of Local 266, and these premises were not owned by respondent; however, respondent's place of business and operation was in the offices of Local 266. The Fourth Amendment protects not only the security of the home but a person's place of business. *Berger v. State of New York*, 388 U. S. 41; *Go Bart Importing Co. v. United States*, 282 U. S. 344; *Silverthorne Lumber Co. v. United States*, 251 U. S. 385. As recently as *See v. City of Seattle*, 386 U. S. 541, 543, this Court stated: "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *Jones* does not require ownership of the premises or the seized property, and therefore, the Fourth Amendment protects respondent in the privacy of the union office.[27]

Accordingly, respondent was the (1) "victim" of the search and seizure and (2) he had an interest in the premises searched and the property seized. In either instance, respondent's privacy was invaded.

Petitioner, however, argues that all of the foregoing is irrelevant because (1) respondent did not own the seized books and records or searched premises, and therefore, had no personal interest which can be protected, (2) the "directed against" or "victim" standard is irrational in

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[27] See *Katz v. United States*, 36 U. S. L. Week 4080 (U. S. December 19, 1967) for observation of what is a "constitutionally protected area."

this instance and (3) there was no invasion of respondent's personal privacy.

If respondent had been the legal owner of the books and records, the Fourth Amendment would unquestionably protect him. Presumably, the same rationale would apply to his legal ownership of the premises. Correspondingly, petitioner requests that this Court return to property law concepts of ownership in order to establish a "personal interest" in the property seized or premises searched which can be protected. This position is difficult to reconcile with language and holding of *Jones*.

Strict property concept no longer control the Fourth Amendment and the actual ownership of the books and records or premises becomes irrelevant. Aside from *Jones*, this is also apparent in *Warden v. Hayden*, 387 U. S. 294, 304-305:

> "We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts. (Citing *Jones v. United States, id.* and *Silverman v. United States*, 365 U. S. 505, 511.) This shift in emphasis from property to privacy has come about through a subtle interplay of substantive and procedural reform * * *[28] In determining whether someone

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[28] "The remedial structure at the time even of *Weeks v. United States*, 232 U. S. 383, was arguably explainable in property terms. The Court held in *Weeks* that a defendant could petition *before* trial for the return of his illegally seized property, a proposition not necessarily inconsistent with *Adams v. People of State of New York*, 192 U. S. 585, which held in effect that the property issues involved in search and seizure are collateral to a criminal proceeding. The remedial structure finally escaped the bounds of common law property limitations in *Silverthorne Lumber Co. v. United States*, 251 U. S. 385 and *Gouled v. United States supra*, when it became established that suppression might be sought during a criminal trial, and under circumstances which would not sustain

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> is a 'person aggrieved by an unlawful search and seizure' we have refused to import into the law * * * subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical." (Citing *Jones v. United States.*)

Furthermore, it is incorrect and unnecessary to suggest, as petitioner does,[29] that the union books and records became respondent's private records by virtue of the unlawful seizure. Ownership is not necessary to establish an "interest" in the premises or property and this position is hardly compatable with the philosophy of the Fourth Amendment and *Jones.*

It is therefore apparent that ownership of the searched premises or seized property is not controlling. It is also evident that there is no reason why *Jones* should not apply in this instance and that as a result, the "victim" test is pertinent. The result of the state's illegal activities is a plain violation of respondent's privacy, which requires suppression. The intangible rather than the tangible has been violated for "the Fourth Amendment protects peo-

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an action in trespass or replevin. Recognition that the role of the Fourth Amendment was to protect against invasions of privacy demanded a remedy to condemn the seizure in *Silverthorne,* although no possible common law claim existed for the return of the copies made by the Government of the papers it had seized. The remedy of suppression, necessarily involving only the limited, functional consequence of excluding the evidence from trial, satisfied that demand.

The development of search and seizure law since *Silverthorne* and *Gouled* is replete with examples of the transformation in substantive law brought about through the interaction of the felt need to protect privacy from unreasonable invasions and the flexibility in rulemaking made possible by the remedy of exclusion." 387 U. S. at 304-305.

[29] See p. 14 of Petitioner's Brief.

ple, not places * * * Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." *Katz v. United States*, 36 U. S. L. Week at 4081 (U. S. December 19, 1967). See also *Warden v. Hayden, supra.* *Jones* teaches that the morass of property technicality is no longer controlling and these principles have been applied to similar and comparable situations by lower Courts.[30] *Jones* has not been expanded to cover an unanticipated area and the Court of Appeals has not departed from prior decisions of this Court.

POINT II

The personal nature of the Fourth Amendment is not violated by affording Respondent standing.

From the very inception of this proceeding, the State has argued and does now,[31] that respondent had no "personal privilege" under the Fourth or Fifth Amendments in

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[30] See *Henzel v. United States*, 296 F. 2d 650 (5th Cir. 1961) and discussed at length at A. 22. Also in *United States v. Birrell*, 242 F. Supp. 191 (S. D. N. Y. 1965); affirmed on reargument, 243 F. Supp. 36 (1965), defendant was charged with violations of the Securities Act of 1933 and other criminal acts. Birrell was involved with a number of corporations. Many of the corporate books and records were deposited with a third party when a search and seizure occurred. "The Government urges that Birrell is not a 'person aggrieved' * * * and therefore, has no standing * * * The argument for the Government is that Birrell had no property interest in the premises searched, and that the papers seized include 'corporate books and records', * * * which must belong to various corporations * * * It seems clear to me that Birrell does have such an interest even in the 'corporate books and records' as to make him a 'person aggrieved'." 242 F. Supp. at 198. The Court concluded the search was directed at Birrell and *Jones* applied. See *United States v. Kanan*, 225 F. Supp. 711 (D. C. Arizona 1963); 341 F. 2d 509 (9th Cir. 1965).

[31] See p. 12 of Petitioner's Brief.

the union records, relying on *United States v. White*, 322 U. S. 694, and *Wilson v. United States*, 221 U. S. 361. At the same time, the state has always admitted the illegality of the search and seizure. By advancing the foregoing, the state attempts to mask its illegality by repeatedly asserting that a lawful subpoena *duces tecum* was issued and that a union officer has no constitutional right to refuse, on the grounds of self incrimination, to produce books and records when faced with a lawful subpoena *duces tecum*. In the same vein, petitioner asserts no "personal rights" of respondent were violated by the search of the union offices.[32]

In *Wilson*, a *lawful subpoena duces tecum* was issued to the United Wireless Telegraph Company and served upon the company through Wilson, its president. Wilson declined to deliver to the Grand Jury the books requested upon the grounds that "the matters therein might incriminate him" and that consequently the Fourth Amendment was being violated. In ordering production of the books, the Court at length discussed the Fifth Amendment and concluded that Wilson could not avail himself of the defense of *self-incrimination* when corporate books were involved, in response to a lawful subpoena.

In *White*, the Grand Jury issued a subpoena *duces tecum* to Local 452 of the International Union of Operating Engineers, for the production of books and records. The subpoena was *lawfully* served upon the President of the Union and he declined to produce the books and records upon the ground that the Fourth and Fifth Amendments protected him. The Court held otherwise and stated that "neither the Fourth nor the Fifth Amendment * * * re-

[32] See pages 7, 8 and 17 of Petitioner's Brief. This argument has been treated by respondent at pages 14-17 of Respondent's Brief.

quires the recognition of a practice against self-incrimination under the circumstances of this case". (Emphasis added 322 U. S. at 698.)

It is clear, therefore, that *White* and *Wilson* deal only with the right of a union or corporate officer to refuse upon the ground of *self-incrimination* to submit union or corporate books and records pursuant to a *validly issued* subpoena *duces tecum*.[33] These cases in no way whatsoever address themselves to the question presently before the Court, *i.e.* the right of a union officer to raise the Fourth Amendment when there has been an *admitted illegal search* and *seizure*. *White* and *Wilson*, therefore, do not support the conclusion that respondent cannot assert the Fourth Amendment.

The issue in this case does not relate to self-incrimination but specifically to an admitted, unlawful, unreasonable search and seizure in direct violation of the Fourth Amendment. The personal nature requirement, whatever, that may be, of the Fourth Amendment does not rest on ownership of property. Instead, if respondent is the victim, as he was, and if his privacy was invaded, as it has been, then the Fourth Amendment protects respondent.

POINT III

Fifth Amendment rights need not be violated in order for the Fourth Amendment to prevail.

As previously noted, a union or corporate officer has no constitutional privilege to refuse on the grounds of self incrimination to produce corporate or union books and records under a lawful subpoena *duces tecum* and respondent has never asserted that suppression is based upon the

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[33] See Comment, *Books and Records and the Privilege Against Self-Incrimination*, 33 Brooklyn Law Review 70 (1966).

Fifth Amendment. Rather, suppression is predicated upon the Fourth Amendment which prohibits unlawful searches and seizures. At this point, the relationship of the Fourth and Fifth Amendments bears examination.[34]

Commencing with *Boyd v. United States*,[35] 116 U. S. 616, it was concluded that there was an intimate relationship between the Fourth and Fifth Amendments. In *Mapp v. Ohio, supra*, this "intimate relationship" was recognized. Mr. Justice Clark pointed out that "the philosophy of each amendment (*i.e.*, the Fourth and Fifth Amendments) and each freedom is complementary to, although not dependent upon, that of each other in its sphere of influence."[36] Thus, the exclusionary rule flows from the Fourth Amendment.[37]

Similarly in *Schmerber v. California*,[38] 384 U. S. 757 this Court considered the Fourth Amendment as separate and

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[34] See Comment, *The Fourth and Fifth Amendments—Dimensions of an "Intimate Relationship"*, 13 U. C. L. A. Law Review 857 (1966); also comment, *Constitutional Law! Supreme Court Delineates the Relationship between the Fourth and Fifth Amendments*, 1967 Duke Law Journal 366.

[35] 116 U. S. at 633. "We have already noticed the intimate relation between the two amendments * * * For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in a criminal case is condemned in the Fifth Amendment * * *"

[36] 367 U. S. at 651.

[37] See concurring opinion by Mr. Justice Black, 367 U. S. at 661, and dissenting opinion by Mr. Justice Harlan at 367 U. S. at 685; see also *Malloy v. Hogan*, 378 U. S. 1; *Linkletter v. Walker*, 381 U. S. 618; *Warden v. Hayden*, 378 U. S. 294.

[38] Defendant was arrested for driving while intoxicated. Taken to a hospital, a physician extracted a blood sample from defendant at the direction of the arresting police officer. Defendant objected to this extraction. At the trial, the sample was admitted into evidence despite the assertation that the Fourth and Fifth Amendments had been violated. This Court held that the introduction of the sample was permissible and that neither the Fifth Amendment was violated because no communicative act was involved nor the Fourth Amendment was violated because there was sufficient cause to examine the defendant for intoxication.

distinct from the Fifth Amendment and recognized that a defendant may assert the protection of the Fourth Amendment in situations where there is no Fifth Amendment right. Even though respondent may not have asserted the Fifth Amendment, the propriety of a search and seizure, according to *Schmerber,* depends upon probable cause and reasonableness of the methods utilized in securing the evidence.[39] Since the State has always admitted the illegality of the search and seizure, the Fourth Amendment alone is sufficient to afford respondent his constitutional protection.

POINT IV

Silverthorne Lumber Co. v. United States precludes the use against Respondent of the illegally seized Union books and records.

It was argued by respondent before the Court of Appeals that *Silverthorne Lumber Co. v. United States,* 251 U. S. 385 also required suppression of the illegally seized books and records. While this argument was not examined by the Court of Appeals,[40] the *Silverthorne* rationale additionally represents a compelling argument for exclusion of the admitted illegally seized evidence.

In *Silverthorne* it was held that a corporation enjoys the rights granted by the Fourth Amendment to the same extent as an individual, and that corporate records unlawfully seized could not be used as evidence in a prosecution

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[39] 384 U. S. at 768. "We begin with the assumption that once the privilege against self-incrimination has been found not to bar compelled intrusions into the body for blood to be analyzed for alcohol content, the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner."

[40] 379 F. 2d at 905, Footnote 12.

against the corporation. Furthermore, such illegally seized corporate records could not be used in a prosecution against the individual corporate officers. As in *Silverthorne,* the seizure of the union records in the present case is admittedly unlawful; and, as here, the government in *Silverthorne* argued that since the individual officers could not claim the immunity of the Fifth Amendment from the production of the corporate records and papers, the Fourth Amendment likewise did not protect them from an unlawful seizure of corporate records and papers. The Court in *Silverthorne* rejected this contention, stating that rights under the Fourth Amendment *"are to be protected even though the same result might have been achieved in a lawful way"*, 251 U. S. at 392, so that the illegally seized corporate records could not be used against either the corporation or its officers.

As in *Silverthorne,* the state in the present case could have obtained the union records in question by procuring a search warrant or seeking a further order to enforce the subpoena *duces tecum.* The union records could then have been used against the individual officers. The state chose, however, to obtain the records by means of an unlawful search and seizure and, consequently, *Silverthorne* teaches that those illegally seized records cannot be used as evidence in a prosecution against the union officers.

In *Silverthorne* the government was ordered by the District Court to return the illegally seized corporate records. Complying, the government then attempted to obtain the same records by a subpoena directed to Frederick Silverthorne, individually. He refused to produce the corporate records and was subsequently held in contempt. The Court noted that if such a procedure were sanctioned, then the government could, by this simple two-step process, circumvent the mandates of the Fourth Amendment:

> "In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired should not be used before the Court but that it shall not be used at all." 251 U. S. at 392.

Thus, it is clear from *Silverthorne* that the Fourth Amendment prohibits unlawful searches and seizures of corporate papers and that the fruits of such seizures cannot be used in a prosecution against a corporation or a union or its officers.

Since *Silverthorne*, it had often been argued that *Silverthorne* was not intended to prohibit the use of illegally seized evidence against all persons, but only as against those persons who had standing to sue or, in other words, persons whose rights were invaded by the unlawful search. *Silverthorne* clearly established that some individuals could assert Fourth Amendment rights when corporate records were illegally seized. Questions remained, however, concerning which particular individuals had standing to assert these rights. These latter questions were fully explored in and resolved by *Jones*.

Subsequent to *Silverthorne*, *In re Dooley*, 48 F. 2d 121 (2nd Cir. 1931) applauded *Silverthorne* and emphasized, in a carefully reasoned discussion, the right of a corporate officer to employ the Fourth Amendment in a prosecution against him to exclude illegally seized corporate records:

> "Because the corporation and its officers could not claim immunity under the Fifth Amendment from the production of corporate papers, it was contended in the *Silverthorne* Case that the Fourth Amendment likewise did not protect them from an unlawful search for corporate papers and so would not prevent the United States from requiring the production of the corporate papers at the trial. The Supreme Court held that a corporation enjoys the immunities granted

by the Fourth Amendment to the same extent as an individual, and that the subpoena did not lie because *the papers unlawfully seized could not be used as evidence against the corporation or its officers. Such a decision was necessary in order to afford adequate protection to the corporation against an unlawful search and seizure. If corporate property illegally seized could be used in evidence against the officers, there would be little inducement offered to government agents to abstain from raids, seeing that the only real detriment the prosecution would suffer in such circumstances for its unlawful conduct would be the inability to have fines imposed upon a corporate defendant.* The court did no more than hold that, where the search had invaded the rights of all defendants, the papers seized could not be used against any of them, even though the papers called for by the subpoena were only corporate papers." (Emphasis added. 48 F. 2d at 121-122.)

The Court in *Dooley* further noted that the *Silverthorne* case did not go so far as to preclude the use of evidence obtained through an unlawful search and seizure even as against persons whose rights have not been invaded. Therefore, the Court in *Dooley* would not grant an injunction "to protect individuals who are not before the Court, and whose rights, so far as appears, have not been invaded at all".[41]

It is submitted that *Silverthorne, Dooley* and other lower court cases[42] fully support the decision of the Court of

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[41] 48 F. 2d at 122.

[42] See *United States v. Cooper,* 288 F. 604 (Iowa 1923); *United States v. Birrell,* footnote 30. The Court here held that Birrell, as an individual, had standing to raise the exclusionary rule of the Fourth Amendment to prevent the prosecution from using illegally seized corporate records. The Court also distinguished various Second Circuit cases, to wit: *United States v. Antonelli Fireworks Co.,* 155 F. 2d 631 (2nd Cir. 1946); *United States v. Fago,* 319 F. 2d 791 (2nd Cir. 1963); *Lagow v. United States,* 159 F. 2d 245 (2nd

(Footnote continued on following page)

Appeals. These cases clearly recognize that the exclusionary rule of the Fourth Amendment is available to corporate and union officers to prevent the use of records obtained from illegal searches and seizures.

Although at the time *Silverthorne* was decided, the Fourth Amendment did not apply to the states via the Fourteenth Amendment. The decision in *Mapp* brings the full force of *Silverthorne* to bear upon the states:

> "Since the Fourth Amendment's right of privacy has been declared enforceable against the states through the Due Process Clause of the Fourteenth, it *is enforceable against them by the same sanction of exclusion as is used against the Federal Government.* * * * To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment. Only last year the Court itself recognized that the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' "[43] (Citing *Elkins v. United States,* 364 U. S. at 217. Emphasis added.)

The decision of the Court of Appeals does not restrict police investigation. It does not preclude the authorities from obtaining books and records in a lawful manner. The Court of Appeals is simply requiring the authorities to proceed according to the minimum standards of the Fourth Amendment. The purpose of the exclusionary rule, to prevent unlawful searches and seizures, requires that the

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(Footnote continued from preceding page)

Cir. 1946) and *United States v. Guterma,* 272 F. 2d 344 (2nd Cir. 1959) (see also *United States v. DeVasto,* 52 F. 2d 26 [2nd Cir. 1931]), which were treated in the instant case as being of dubious value. 379 F. 2d at 902. It is also submitted that these cases were based on an erroneous application of *Silverthorne* and *Dooley.*

[43] *Mapp v. Ohio,* 367 U. S. at 655-56; see also *Linkletter v. Walker,* 381 U. S. 618.

Fourth Amendment be applied to the states. In cases such as that now before the Court, the same sanction of exclusion that was applied to the federal government in the *Silverthorne* case should also be applied to the State of New York to prevent such actions.

CONCLUSION

For the foregoing reasons, the decision of the Circuit Court of Appeals should be in all respects affirmed.

Dated: Buffalo, New York, April 2, 1968.

Respectfully submitted,

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